

STATE OF MICHIGAN
COURT OF APPEALS

In re CANFIELD, Minors.

UNPUBLISHED
May 17, 2018

No. 340244
Ottawa Circuit Court
Family Division
LC No. 10-064660-NA

Before: METER, P.J., and GADOLA and TUKEL, JJ.

PER CURIAM.

Respondent-mother appeals as of right the order terminating her parental rights to four minor children, EC, NC, DC, and MC, under MCL 712A.19b(3)(c)(i) (conditions of adjudication continue to exist) and MCL 712A.19b(3)(g) (failure to provide proper care or custody). We affirm.

In November 2014, the children were removed from mother's care after she threw a cup at EC, resulting in a laceration on his head that required staples. Mother was charged with second-degree child abuse for the incident. In January 2015, mother pleaded no contest to the allegations in the amended petition, and the trial court assumed jurisdiction over the children. Mother's initial behavior around the children was poor, and her parenting time with the children was therefore suspended in March 2015. In May 2015, after showing some progress in services and after drug screens returned negative results, mother was allowed visits with her children again. Mother's participation in services progressed, and she was granted unsupervised visits beginning in January 2016 and overnight visits beginning in March 2016.

The two boys, EC and NC, were returned to mother's care in September 2016, and the agency intended to transition the girls, DC and MC, to mother's care after she adjusted to having the boys. Mother was referred to Families First to help her manage having the children in her care, but mother declined to work with the first Families First worker because he was a male. After a second attempt to get mother to follow the program, she was dismissed for noncompliance. The second Families First worker witnessed an incident in mother's home in November 2016 during which mother verbally berated EC for a period of 10 minutes in the presence of the other three children. She blamed EC for everything that had happened in the case, called him a vulgar name, and threatened to "whoop him one." Moreover, mother tested positive for cocaine in October and December 2016, while the boys were in her custody. The trial court again removed the boys from mother's care in January 2017.

Mother's compliance with services improved over the next quarter, and she was again granted unsupervised visits in April 2017. However, a drug screen from May 15, 2017, tested positive for cocaine and showed the presence of cocaine metabolites. Mother's parenting time was again supervised, and the agency recommended a goal change to termination. Mother's parental rights were terminated following three days of termination hearings.

Mother first argues on appeal that the trial court erred in finding a statutory ground for termination of her parental rights. We disagree.

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). "This Court reviews for clear error the trial court's ruling that a statutory ground for termination has been established . . ." *In re Schadler*, 315 Mich App 406, 408; 890 NW2d 676 (2016) (quotation marks and citation omitted). "A finding is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (quotation marks, citations, and brackets omitted).

The provisions under which the trial court terminated mother's parental rights, MCL 712A.19b(3)(c)(i) and (g), state, in relevant part:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

A pertinent question is whether "the totality of the evidence amply supports that [respondent] had not accomplished any meaningful change in the conditions existing by the time of the

adjudication.” See *In re Williams*, 286 Mich App 253, 272; 779 NW2d 286 (2009). In addition, the failure to benefit from services supports termination under MCL 712A.19b(3)(c)(i) or (g). See *In re LaFrance*, 306 Mich App 713, 728-729; 858 NW2d 143 (2014).

In reference to the statutory ground under MCL 712A.19b(3)(c)(i), mother does not challenge that more than 182 days had elapsed since the initial dispositional order. She challenges the trial court’s determination that the conditions leading to adjudication continued to exist. Alternatively, she argues that the conditions could be rectified within a reasonable amount of time.

Based on a review of the amended petition to which mother pleaded no contest, mother’s initial issues were loss of temper and substance abuse. The amended petition referenced the incident in November 2014 during which mother threw a cup at EC, causing a physical injury. The amended petition also noted that EC’s meconium tested positive for morphine when mother did not have a prescription for morphine.

As the trial court pointed out, there was ample testimony that mother continued to lose her temper. The second Families First worker testified that mother berated EC for a period of approximately 10 minutes, blaming him for everything that had happened in the case, calling him a vulgar name, and threatening physical harm. All of the children were present for the incident, and, because mother was screaming, the other children heard what she said to EC. Mother also expressed anger towards agency workers. When a caseworker informed mother about a positive drug screen, mother called the caseworker and screamed at her. The caseworker testified that mother would also, at times, give her telephone to a friend so that the friend could scream at the caseworker. In addition, the trial court had mother removed from the courtroom twice for disrupting the termination hearings. The court did not clearly err in finding that mother had not rectified her inability to control her temper, and it was unlikely that she would improve her emotional control within a reasonable amount of time because these incidents happened after mother had been given significant periods of services to help her deal with her emotional regulation.

The trial court also had evidence that mother had not dealt with her substance-abuse issues. Mother tested positive for cocaine on three occasions, when children were in her care. Mother consistently denied cocaine use but could not offer a believable explanation for the positive screens. A Forensic Fluids lab director testified that the positive screen on May 15, 2017, could not have been caused by incidental contact with cocaine because of the presence of cocaine metabolites that showed that the parent drug had been processed through the liver. Thus, the trial court did not clearly err in concluding that mother still struggled with substance abuse and that she could not address the condition within a reasonable time, seeing as she was still using drugs almost two and a half years after initial removal of the children.

The trial court did not clearly err in finding that the conditions that led to adjudication continued to exist and that they could not be rectified within a reasonable amount of time. See *In re Mason*, 486 Mich at 152; *In re Schadler*, 315 Mich App at 408. Although this Court “need not consider the additional grounds upon which the trial court based its decision” once it finds that the trial court did not clearly err in finding one statutory ground for termination, *In re HRC*,

286 Mich App 444, 461; 781 NW2d 105 (2009), we find that termination was warranted under MCL 712A.19b(3)(g) also.

The trial court determined that the people who testified that they had observed visits between mother and the children were credible witnesses, and they generally agreed that mother lacked parenting skills to properly manage the children. Mother's therapist testified that she would expect mother's parenting skills to improve as mother made significant progress in therapy in the months leading up to termination, but testimony indicated that mother's parenting skills were still inadequate over the course of 2017. In addition, mother struggled with controlling her temper and tested positive for cocaine use when the children were in her care. Thus, the trial court did not clearly err in finding that mother failed to provide proper care or custody for her children and could not do so within a reasonable amount of time. See *In re Mason*, 486 Mich at 152; *In re Schadler*, 315 Mich App at 408.

Mother next claims on appeal that she was denied due process of law because of ineffective assistance of counsel when her attorney did not urge the trial court to view available recordings of her last "couple of" visits with her children. We disagree.

"The principles applicable to claims of ineffective assistance of counsel in the arena of criminal law also apply by analogy in child protective proceedings[.]" *In re Martin*, 316 Mich App 73, 85; 896 NW2d 452 (2016). Based on criminal law preservation standards, mother was required to move for a new trial or request an evidentiary hearing to preserve her claim of ineffective assistance of counsel. *People v Foster*, 319 Mich App 365, 390; 901 NW2d 127 (2017). Because mother did not move for a new trial or request an evidentiary hearing, the issue is unpreserved. See *id.*

Mother's claim that she "was denied the effective assistance of counsel presents a question of constitutional law subject to review de novo." *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2002), overruled on other grounds by *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014). Because her claim is unpreserved for appeal, "this Court's review of this issue is limited to mistakes apparent on the appellate record," and "[i]f the record does not contain sufficient detail to support [mother]'s ineffective assistance claim, then [s]he has effectively waived the issue." *Foster*, 319 Mich App at 390 (quotation marks and citation omitted).

To prevail on a claim of ineffective assistance of counsel, "it must be shown that (1) counsel's performance was deficient, falling below an objective standard of reasonableness, and that (2) the deficient performance prejudiced the respondent." *In re Martin*, 316 Mich App at 85. To show prejudice, mother must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *In re CR*, 250 Mich App at 198 (quotation marks and citations omitted).

Mother argues that her attorney was ineffective for not urging the trial court to view the available recordings of her visits, which were the last visits immediately before the final termination hearing on September 5, 2017. The caseworker was unable to play the recordings because of a technical error with connecting to the trial court's internet service. Mother cannot prevail on her claim of ineffective assistance of counsel because she cannot show that she was

prejudiced by any alleged error involving her attorney's failure to urge the court to view the recordings. *Id.*; *In re Martin*, 316 Mich App at 85.

First, respondent does not even recite what content in the recordings would have been so favorable such that the court's ruling would have changed. Respondent merely states that "[i]f that video had been introduced it may well have produced a different result." Moreover, even assuming that the recordings contained some positive interactions, there is no reasonable probability that they would have changed the trial court's determination that the visits were largely unsuccessful, in light of all the testimony provided.¹ Moreover, mother's parenting skills were not the only basis for termination. Her inability to control her temper was a condition that continued to exist at termination, as demonstrated during the termination hearings themselves when she had to be removed from the courtroom. The trial court also based its termination on mother's substance abuse as shown through the three positive drug screens for cocaine. Because mother has demonstrated no reasonable probability that viewing the recordings would have changed the trial court's decision, mother cannot prevail on her claim of ineffective assistance of counsel. *Id.*; *In re CR*, 250 Mich App at 198.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael F. Gadola
/s/ Jonathan Tukel

¹ We note that the final termination hearing was more than two years and nine months after the children were initially removed from mother's care.